In The United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 18217 and 18293 (Consolidated)

CONSTRUTION, PRODUCTION AND MAINTENANCE LABORERS UNION, LOCAL NO. 383, AFL-CIO, AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL NO. 1089, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Cross-Petitioner.

INDEPENDENT CONTRACTORS ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside in Part an Order of the National Labor Relations Board and on Cross-Petition to Enforce Same (Case No. 18217); and on Petition to Review Another Part of the Same Order (Case No. 18293)

BRIEF FOR PETITIONING UNIONS

INDEX

Page

Jurisdiction 1

Statement of the case 2

Statement of Facts 4

Specification of Errors 9

Summary of Argument 10

Argument 11

I. As a matter of fact, neither union picketed with an immediate or direct object of forcing Colson and Stevens to sign the Arizona Master Labor Agreement. The picketing was for organizational and recognitional purposes only. 12

II. Had Colson & Stevens signed the Arizona Master Labor Agreement, it would not, by its terms, have compelled that company to "cease doing business" with subcontractors Schwartz, Riggs and Haun. Therefore, the signing of the Agreement was not a proscribed object of the picketing within the meaning of subsection (B) of 8(b)(4). ..14

III. Assuming arguendo that the signing of the Agreement was an object of the picketing and that the terms of the Agreement would have affected the various subcontractors, nonetheless the picketing was primary in nature and therefore not unlawful under Section (B) of 8(b)(4) since the subcontractor clause was a mandatory subject of collective bargaining. 17

INDEX (Cont'd)

IV. Assuming, arguendo, that the picketing was to obtain the signing of the Arizona Master Labor Agreement, nonetheless such conduct was primary in nature and not in violation of either subsection (A) or (B) of 8(b)(4), since the Agreement was lawful, and expressly so declared by construction industry proviso to Section 8(e). 22

V. Assuming, arguendo, a violation of either subsection (A) or (B), or both, by either or both of the unions, still the Order is too broad in scope, particularly as it relates to "any other employer." 30

Conclusion 31

Certificate 31

Appendix A (Master Labor Agreement) 33

Appendix B (List of Exhibits) 39

TABLE OF AUTHORITIES CITED

Cases: Page

Bricklayers, etc. 125 NLRB 1179 25

Ex Parte Collett, 337 U.S. 55 23

Communications Workers of America, AFL-CIO, et al, v. NLRB, 362 U.S. 479 31

Cuneo v. Carpenters, Essex County & Vicinity, 207 F. Supp. 932, 45 LC Para. 17,826 .....24, 26, 29

Deaton Truck Line v. Local 612, Teamsters, (CA-5; 11/62) —F.2d—; 51 LRRM 2552 20

Gemsco, Inc. v. Walling, 324, U.S. 244 23

Hoffman v. Teamsters, Joint Council No. 38, (N. Dist. Cal.; 1962) —F.Supp.—; 45 LC Para. 17,803 15

LeBus, etc. v. Local 60, United Ass'n of Journeyment, etc., 193 F. Supp. 392, 42 LC Para 16,930 .....23, 26, 29

Local No. 741, etc. (Keith Riggs), 137 NLRB No. 121, 50 LRRM 1313 21

Local 19, Longshoremen and Vance, 137 NLRB No. 13 21

Local 761, Inter. U. of E. R & M Wkrs, v. NLRB, 366 U.S. 667 28

Local 24, Teamsters v. Oliver, 358 U.S. 283 .....19, 20

Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door), 357 U.S. 93 .....23, 24, 26, 28, 29

Moore-Drydock, 92 NLRB 547 28

Ohio Valley Carpenters District Council, et al., 136 NLRB No. 89 19

NLRB v. Bangor Bldg. Trades Council, 278 F.2d 287 ..12, 13, 25

NLRB v. Denver Bldg. & Construction Trades Council, 341 U.S. 675 .....13, 28

TABLE OF AUTHORITIES CITED (Cont'd)

NLRB v. Local 47, International Bro. of Teamsters, etc., 234 F.2d 296 (Texas Industries, Inc.) 25

NLRB v. International Longshoremen's & Warehousemen's Union, Local 10, et al., (CA-9; 1960) 283 F.2d 558 ....30, 31

NLRB v. International Rice Milling Co., 341 U.S. 665 ....13, 27

NLRB v. Lithographers, Local 17 (CA-9; 1962) 309 F.2d 31 .....23, 27, 29

NLRB v. Teamsters Local 639, 362 U.S. 274 30

NLRB v. United Ass'n of Journeymen, et al., (CA-9; 1962) 300 F.2d 649 30

Packard Motor Co. v. NLRB, 330 U.S. 485 23

Railroad Motor Co. v. NLRB, 330 U.S. 485 23

Railroad Telegraphers v. Chicago & Northwestern Ry. Co., 362 U.S. 330 19

Servette, Inc., v. NLRB (CA-9; 11/62) 310 F.2d 659 23

Teamsters Union v. Oliver, 358 U.S. 283 .....19, 20

Timkin Roller Bearing Co., 70 NLRB 500 19

Town & Country Mfg. Co., 136 NLRB No. 111, 49 LRRM 1918 21

Unexcelled Chemical Corp., v. U.S., 345 U.S. 59 23

United States v. Drum 368 U.S. 370 20

W. L. Rives Co., 125 NLRB 772 19

Other Authorities

29 U.S.C. 151 2

29 U.S.C. 157 21

29 U.S.C. 158(b) 9

29 U.S.C. 158(e) 10

29 U.S.C. 163 12

ARS 34-322 and 325 (Ariz. Rev. Stat) 8

Davis-Bacon Act, 40 U.S.C. 276a, et seq 21

Georgetown Law Journay, Vol 48, p.355 15

H.R. Rep. No. 1147 on S. 1555, 105 Cong. Rec. 16415, II Legis. Hist. of LMRDA 1433 29

H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959), I Legis. Hist of LMRDA 942 25

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

JURISDICTION

Construction, Production and Maintenance Laborers Union, Local No. 383, AFL-CIO, hereafter called the Laborers Union, and the United Brotherhood and Joiners of America, Local No. 1089, AFL-CIO, hereafter called the Carpenters Union, have petitioned (R. 68-70)[1] to set aside in part an order (R. 60-62) issued against

[1] References to the Pleadings, Volume I of the Record, are designated "R." References to the Transcript of Testimony are designated "Tr." References to Exhibits are designated "Ex."

them on July 26, 1962, by the National Labor Relations Board pursuant to the provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 USC Sec. 151, et seq.), hereinafter called the Act. The Board's Decision and Order are recorded at 137 NLRB No. 149. The conduct upon which said Order is based occurred in Phoenix, Arizona, within this judicial circuit, and was found by the Board to be unfair labor practices affecting interstate commerce within the meaning of the Act.

The Board has responded to said petition by cross-petitioning (R. 72) for enforcement of that part of said Order which the petitioning Unions are asking to be set aside.

Independent Contractors Association has intervened (R. 74) in connection with the foregoing Petition, and has, in addition, filed its Petition (R. 79) for review of another portion of the same Board Order.

STATEMENT OF THE CASE

In connection with certain picketing done by the Carpenters Union in October, 1960, and by the Laborers Union in January, 1961, the Independent Contractors Association filed charges and amended charges with the National Labor Relations Board in January and February, 1961, against these two unions, and at one time or the other, against some 20 other unions or union councils (R. 3-10).

The Board issued its Consolidated Complaint (R. 11), but against only the Carpenters Union and the Laborers Union. In brief, the Board alleged that the picketing had been jointly conducted for more than thirty days without a petition for an election under Section 9(c) of the Act having been filed, and that, accordingly, these two unions had violated Section 8(b) (7) (c) of the Act. Further, the Board alleged that the objects of the picketing were (1) to force or require Colson & Stevens Construction Co., Inc to enter into an agreement prohibited by Section 8(e) of the Act; (2) to force or require Colson & Stevens Construction Co., Inc. to cease doing business with certain subcontractors; (3) to force or require Colson's subcontractors to recognize and bargain with

these unions, or other labor organizations; and (4) to force or require Colson to recognize or bargain with these two unions as the representatives of Colson's employees, and to force or require these employees to accept or select these Unions as their collective bargaining representative, all in violation of Section 8(b) (4) (i) (ii) (A) and (B) of the Act. (R. 11-15).

After a hearing had before a duly designated Trial Examiner of the Board in April, 1961, an Intermediate Report and Recommended Order was issued on May 23, 1961, in which it was concluded (1) that neither of the Unions had violated Section 8(b) (4) (A) and (B) of the Act, but (2) that they had separately violated Section 8(b) (7) (C) of the Act "by reason of the refusal of suppliers to cross the picket lines." (R. 25-30).

Both the General Council and the unions took exceptions to this Intermediate Report insofar as it ruled against their contentions, and as a result, the Board, by its Decision and Order, dated July 26, 1962 (R. 54-65) reversed the Trial Examiner. It concluded that since neither of the unions' picketing had exceeded a reasonable period lasting more than 30 days, neither had violated Section 8(b) (7) (C) of the Act, (R. 59). But it found the separate picketing of each union to be illegal under Section 8(b) (4) (A) and (B) of the Act, and in connection therewith, said: (R. 59-69).

> "By picketing Colson and Stevens Construction Co., Inc., with an object of forcing or requiring the said Company to enter into an agreement which is prohibited by Section 8(e), the Respondents have engaged in unfair labor practices within the meaning of Section 8(b) (4) (i) and (ii) (A) of the Act.
>
> "By picketing Colson and Stevens Construction Co., Inc., with an object of forcing or requiring the said Company to cease doing business with Schwartz Plumbing Co., Riggs Plumbing and Heating Co., and Earl H. Haun, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b) (4) (i) and (ii) (B)."

As a result of the foregoing findings, the Board ordered each of the Unions (R. 60 and 61) to cease and desist from:

> "Engaging in, or inducing or encouraging employees of Colson

and Stevens Construction Co., Inc., or any other employer, to engage in a strike, or threatening, coercing or restraining Colson and Stevens Construction Co., Inc., or any other employer, by a strike or picketing, where in either case an object thereof is to force or require said employer to enter into any agreement which is prohibited by Section 8(e).

"Engaging in, or inducing or encouraging employees of Colson and Stevens Construction Co., Inc., or any other employer, to engage in a strike, or threatening, coercing or restraining Colson and Stevens Construction Co., Inc., or any other employer by a strike or picketing, where in either case an object thereof is to force or require said Employer to cease doing business with Schwartz Plumbing Co., Riggs Plumbing and Heating Co., and Earl H. Haun."

STATEMENT OF FACTS

During late 1960 and early 1961, Colson & Stevens Construction Co., Inc., was engaged in the business of general construction (Tr. 172). The Company had no collective bargaining agreements with labor unions (Tr. 177). It hired only carpenters and laborers. It subcontracted to other employers the rest of its work (Tr. 177).

On two different occasions the Carpenters Union had contacted the Company and had been told that the Company did not want its carpenters to be union, that it wanted to continue on a non-union basis (Tr. 283).

The Company, in October, 1960, had a contract for the construction of a building in Phoenix, Arizona, known as the Yellow Front Store (Tr. 188). The Carpenters Union learned about this contract (Tr. 283). Thereupon it caused a letter to be written by the District Council of Carpenters to the Phoenix Building and Construction Trades Council (Tr. 281; Exhibit 7), requesting that the Company "be placed on the official "unfair list." The Phoenix Building and Construction Trades Council is an organization composed of about 20 different crafts, involving numerous unions, in the building industry in Phoenix and vicinity (Tr. 282). Among other things, it maintains an "unfair list" (Tr. 350-351). As a matter of policy the Trades Council did not take action on the

letter from the District Council of Carpenters until a committee was appointed for an investigation of the matter (Tr. 351). Accordingly, such a committee was designated: Ellison from the Carpenters Union, and a representative from each of the brickmasons', cement finishers', plumbers', and electricians' unions (Tr. 284-285). This group met at the Yellow Front job site on October 14, 1960, and while there engaged in a conversation with Mr. Colson and Mr. Stevens (Tr. 357-358).

This conversation lasted about half an hour, (Tr. 220). The brickmason union's agent, Rosensteel, had come out to ascertain whether the company did its own brickmasonry or subcontracted it out. (Tr. 383, 384). The record is essentially silent as to the purpose and the part played, if any, by the plumbers', cement finishers', and electricians' agents.

Ellison, the agent for the Carpenters Union, wanted to talk about the company's carpenters, and this is what the conversation was mostly about. (Tr. 192, 359). Mr. Colson had had some experience with labor unions (Tr. 192) and apparently believed that Ellison desired the company to sign the Arizona Master Labor Agreement (Ex. 44)[2] with the Carpenters Union. (Tr. 193).

This Agreement was the industry-wide construction agreement covering work performed by carpenters, laborers, cement finishers, and teamsters in the state of Arizona. Numerous unions representing each of these crafts, including the Carpenters Union party hereto, were signatory. This Agreement actually is four craft agreements rolled into one, having common administrative clauses, but separate wages scales and working rules for each craft.

Actually, however, *no particular agreement was mentioned in the Yellow Front conversation. Nor were any particular contract proposals made to the company.* (Tr. 359)

The company excused its desire to continue on a non-union basis, saying that to go along with Ellison would work a hardship on the company (Tr. 191) and suggesting that the purported non-unions status of its subcontractors on the job was a stumbling

[2] See Appendix for pertinent parts of this agreement.

block. " . . . and he named the subcontractors that were doing work on the project at the time." (Tr. 359). This was an apparent allusion either to the requirement of the Arizona Master Labor Agreement that signatory employers are bound to require their subcontractors to abide by the terms of that agreement insofar as their employees perform laborers', carpenters', cement finishers,' or teamsters' work (Article I.C. of Exhibit 44), or to the generally held idea that union and non-union groups do not like to work together on the same job. However, in either event, there was no problem since all of the subcontractors named to Ellison were *union* contractors. (Tr. 359) Ellison's position was that the "carpentry work was the only problem that was at stake." (Tr. 359) And his purpose was to negotiate a contract, not necessarily the Arizona Master Labor Agreement, for the carpenters. (Tr. 368, 371) "It was just strictly carpenters," Ellison testified. (Tr. 359)

The conversation terminated with Mr. Colson's saying that he couldn't go along with Ellison. (Tr. 360)

Ellison reported back to his union. (Tr. 286) On October 19th, 1960, the Carpenters Union placed pickets at the Yellow Front jobsite, bearing signs reading: "Picketing Colson & Stevens for the purpose of organizing the carpenters on the job, Local 1089." (Tr. 288) English, another business agent, testified that the Carpenters Union had no purpose other than to organize and bargain for the company's carpenters. (Tr. 296) The picketing continued, in a peaceful manner, for 28 days. (Tr. 288) During the picketing, English attempted without success to organize some of the company's carpenters, (Tr. 328, 330, 333) and was prepared to meet and negotiate on a contract if the opportunity arose. (Tr. 295, 333) But neither side to the dispute so much as made a proposal to the other. (Tr. 347) Finally, the Carpenters Union gave up the picketin gas a lost cause. (Tr 295)

After removing its pickets on Nov. 15th, or 17th (Tr. 258), the Carpenters Union did nothing further relative to Colson & Stevens. (Tr. 299)

On the following January 10th, a survey committee of the Trades Council, after going to about 14 other jobs that day,

routinely stopped by the Yellow Front job. (Tr. 391, 397) This committee consisted of Kleiner, a painters' union agent, Cooksey, an agent for the Laborers' Union party hereto, and Gromley, from the brick masons union. (Tr 391) Kleiner spoke to Mr. Stevens and indicated that they would like to talk to him. However, Stevens suggested an office meeting, and emphasized that *he definitely wanted the carpenters' representative prsent.* It was agreed that the meeting would be held on Jan. 12th at the company's office. (Tr. 393)

Kleiner contacted English of the Carpenters to arrange his being at this meeting. (Tr. 394.) Kleiner understood that the purpose of the proposed meeting with the company of Jan. 12th was to talk about future contracts the company might have in the county and to see if the union could supply employees. (Tr. 398)

Kleiner, English, Cooksey, and a representative from the brickmasons met at the company's office on Jan. 12th. (Tr. 300) Stevens was there, then Colson came in a few minutes later. (Tr. 310) The meeting lasted for an hour and a half to two hours. (Tr. 259, 301)

Stevens and English started the conversation. (Tr. 260, 301) and, as reported by English, Stevens said, "We are ready to become signatory to the agreement," explaining that in the past they had done little jobs but were getting bigger ones and now had "room" to become signatory. (Tr. 301) This had reference to the Arizona Master Labor Agreement. Thereafter much of the conversation concerned a "breaking off" point, that is a point in time *in the future* when the subcontractor clause (Art. I.C.) in the Arizona Master Labor Agreement would be effective. (Tr. 202, 302) In this connection, the company said it had a contract on the Trinity Church job and on the Tonto and Kiva schools, and had nonunion subcontractors lined up to do part of the work. After further discussion about the company's carpenters becoming members of the union, (Tr. 205) about what the "prevailing wages" were, that is, the state-required wages to be paid on the school jobs,(Tr

203, 232) and about the carpenters' apprentice program, (Tr. 233, 303) the meeting broke up.

English handed two copies of the Arizona Master Labor Agreement to Stevens near the end of the conversation (Tr 233) when the "prevailing wage" of apprentices on the school jobs were being discussed so that the company would know the scales for the 8 apprentice classifications. (Tr 203, 304)[3] English stated that this was the agreement that the company could sign if it decided to sign. (Tr 265, 307)

The testimony is in conflict as to what the understanding was when the meeting broke up. Colson testified that English wanted to check with other local unions to see if it would be all right for the company to go on with the church job on a "split basis" of union and non-union subcontractors, (Tr 206) with English to notify the company a couple days after talking with a masonry subcontractor named Haun. (Tr 207) Stevens said the understanding was that the company was going to investigate its records to see if it had union subs whose bids were close to the non-union subs (Tr 262) and that English was to tell Stevens where the company "stood with the subs." (Tr 262) However, English and Ellison understood that Stevens had indicated that the company intended to go "all union" if and when it signed the Agreement, (Tr 308, 309, 314) and that Stevens was to look thru the company files to see if there were competitive union subs (Tr 305) and was to call English before the following Tuesday (Tr 304, 305, 364) to advise whether the company would sign the Agreement (Tr 304, 305, 364); and English would then at the request of Colson take up the matter of the non-union subcontractors with the other unions at the Trades Council meeting to see if there would be any difficulty if the company went ahead and finished the church under its current contract arrangements. (Tr 307, 375)

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[3] By Arizona statutes, contractors must pay the "prevailing wage" in construction of public buildings. The prevailing wage is defined as that contained in existing union agreements in the area. See ARS 34-322 and 34-325.

Neither the company officials nor the union agents called the other at any time after the meeting ended. (Tr 208, 269) English neither contacted the subcontractor Haun (Tr 309) nor anyone else about the company (Tr 309), including the Trades Council. From the day of the meeting until served with the unfair labor practice charges in February, the Carpenters Union had done nothing or further concerned itself with the company. (Tr 309)

About two weeks later, on Jan. 25th, the Laborers Union commenced picketing the company at the Tonto and Kiva school jobs in Scottsdale, Arizona (Tr. 207, 262, 400) The pickets carried signs reading: "Picket against Colson and Stevens. Laborers Local 383 wants to organize and bargain for laborers employed by Colson & Stevens." (Tr 267, 400) The Business Agent and Sec'y-Treasurer, Warren, testified without contradiction that the sign indicated the sole object of the picketing, that he had heard that there were laborers working on the job, (Tr 404) that the union wanted to organize and represent them, (Tr 404, 420, 421) and that he was prepared to negotiate an agreement with the company. (Tr 403, 422) There was no contact between the company and the Laborers Union during the picketing. (Tr 404) There was no evidence of anything other than a peaceful picketing. The Laborers Union removed its pickets on Feb. 20th. (Tr 401)

The pickets had been placed on the job with notification to the Trades Council or the Carpenters Union and without consulting any other union (Tr 352) and was removed without contacting any other union. (Tr 401, 402)

SPECIFICATION OF ERRORS

1. The Board erred in concluding as a matter of law (R 60) that either or both of the unions picketed Colson & Stevens with an object of forcing or requiring that company to cease doing business with Schwartz Plumbing Co., Riggs Plumbing and Heating Co., and Earl H. Haun, within the meaning of Section 8(b)(4)(B) of the Act. [29 U. S. C. 158(b)(4)] In this connection, the Board erred in the following respects:

a. In finding as a fact that each union had an object of forcing

Colson & Stevens to sign the Arizona Master Labor Agreement. (R 55)

b. In concluding as a matter of law (not identified as such) that this agreement would have compelled Colson & Stevens to cease doing business with Schwartz, Riggs, and Haun, if they did not comply with the terms of said agreement; that this would have been the necessary effect of signing; (R 55)

c. In failing to find that the subcontractor clause in the agreement was aimed at the protection of wages and conditions of the Colson and Stevens employees, and therefore a proper subject of collective bargaining.

d. In concluding as a matter of law that picketing to obtain a subcontractor clause, *lawful* under section 8(e), was, without more, unlawful under 8(b)(4)(B).

e. In failing to conclude as a matter of law that the picketing was *primary* in nature, and therefore lawful.

2. The Board erred in concluding as a matter of law (R 59) that either or both of the unions picketed Colson & Stevens with an object of forcing or requiring that company to enter into an agreement which is prohibited by Section 8(e) [29 U.S.C. 158 (e)] within the meaning of 8(B) 4(A) of the Act. [29 U.S.C. 158 (b) (4)]. The agreement referred to related to *job-site construction,* and is exempt from Section 8(e).

3. Assuming, arguendo, a violation of either or both subsections (A) and (B) of 8(b)(4) of the Act, still the scope of the order is too broad in view of the record as a whole, particularly as it relates "to any other employers". (R 60, 61)

SUMMARY OF ARGUMENT

In finding each of the unions guilty of violating subsections (A) and (B) of 8(b)(4) of the Act, the Board based its decision upon conclusions that the picketing was to force the employer to sign an agreement which *by its terms* would require the employer to stop doing business with certain subcontractors.

There was no substantial evidence to support a finding, in the first place, that the signing of the argeement was an object of the

picketing. Second, the necessary legal effect of the agreement, had it been signed by the employer, was not to force the employer to "cease" doing business with the subcontractors. Third, assuming the picketing to have been to secure the signing of the agreement, it was *primary* in nature, as opposed to secondary picketing, since the agreement was a proper subject of collective bargaining. And fourth, regardless of the foregoing, the agreement was *lawful* under the construction industry proviso to section 8(e) of the Act, and therefore picketing to *obtain* its execution was not prohibited by either subsections (A) or (B) of the Act.

It is further argued, in the *alternative,* that the Board's Order is too broad in scope insofar as it relates to employers other than the one picketed, since no proclivity for unlawful conduct was shown.

ARGUMENT

The Board has held each of the unions guilty of violating subsections (A) and (B) of 8(b)(4) of the Act. [29 U.S.C. 158 (b)(4)] In pertinent part, these two subsections prohibit picketing where *an object* is:

> "(A) forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by Section (8)(e);"
>
> "(B) forcing or requiring any person . . . to cease doing business with any other person . . .: Provided, that nothing contained in this clause (B) shall be construed to make unlawful where not otherwise unlawful, any primary strike or primary picketing;"

Section 8(e), [29 U.S.C. 158(e)] referred to in subsection (A) above, generally makes it unlawful for a labor organization to enter into so-called hot cargo agreements and other agreements which require an employer "to cease doing business with any other person", but makes the following proviso:

> "Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, . . ."

In finding each of the unions guilty of subsections (A) and (B)

of 8(b)(4), the Board has followed the theory of the case announced during the trial by General Counsel. (Tr 352,3) The theory was that each of the unions had picketed with an object of forcing Colson & Stevens to sign the Arizona Master Labor Agreement, and that this Agreement *by its terms* would compel the company to cease doing business with its subcontractors unless they complied with the Agreement's provisions. Therefore, it was reasoned, the picketing to obtain the agreement was picketing for a prohibited object.

No contention was made by General Counsel, or held by the Board, that the Agreement was itself illegal or prohibited by Section 8(e), or that either of the unions had a dispute with any of the named subcontractors, or that the picketing was anything but peaceful and in accordance with the *Moore-Drydock* standards for common-situs picketing.

The several issues raised by this appeal relating to the alleged subsections (A) and (B) violations will be argued first.

The scope of the Board order will be argued last.

I

As a matter of fact, neither union picketed with an immediate or direct object of forcing Colson and Stevens to sign the Arizona Master Labor Agreement. The picketing was for organizational and recognitional purposes only.

The key finding made by the Board was that each of the unions picketed to force Colson & Stevens to execute the Arizona Master Labor Agreement. (R 55; Exhibit 44) In view of the protection afforded to primary disputes under Section 13 of the Act,[4] the necessary implication is that the Board found the signing of the Agreement, without modification, to be a *direct* or *immediate* object of the picketing. *NLRB v. Bangor Building Trades Council,*

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[4] Section 13 reads: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

278 F.2d 287; *NLRB v. Denver Building and Construction Trades Council,* (1951) 341 U.S. 675; *NLRB v. International Rice Milling Co.* (1951) 341 U.S. 665.

It follows that if such a finding of *fact* is not supported by substantial evidence, then that ends the case and the Decision must be reversed as to the 8(b)(4) violations.

The Carpenters Union picketed Colson & Stevens for 28 or 30 days, beginning October 19th. (Tr 287) Before that, there had been only one contact between this union and the company which could be remotely related to the picketing. That occurred on October 14th, when the union's agent, Ellison, talked with Colson & Stevens at the Yellow Front jobsite about the *carpenters* and about becoming a union contractor. (Tr 359)

The October 14th meeting never reached the level of negotiations, actually. *Nothing* was said about the Arizona Master Labor Agreement. (Tr 359) Certainly there was *no issue raised as to the subcontractor clause,* however, it may be interpreted, since as Ellison understood the matter, all of Colson's subcontractors were *union* contractors. (Tr 313, 359)

Some attempts had been made before the picketing began to organize the company's carpenters, and the same thing occurred after the picketing. (Tr 333, 371) In this respect, the picket sign stated that the Carpenters Union wanted to *organize* and *represent* the company's *carpenters.* (Tr 288) This, it was testified without contradiction, was the *sole* purpose of the picketing. (Tr 296) Had the company consented to negotiate, the Carpenters Union would have bargained for *an* agreement, not necessarily the Arizona Master Labor Agreement. (Tr 295, 371)

The Carpenters Union quit its picketing in mid-November and simply forgot about the matter (Tr 295) until in the *following January* when its agents were *invited by Colson & Stevens* to attend a meeting apparently to discuss the company's becoming a union contractor. (Tr 295, 300, 393) This was the *first* time that the Arizona Master Labor Agreement was mentioned—*long after the Carpenters Union had finished its picketing.*

So much for the Carpenters Union.

As for the Laborers Union, it began picketing in late January. It, too, indicated a desire to organize Colson's employees, that is, its *laborers.* (Tr 400) *There was no other object.* (Tr 400, 420, 421) The only possible tie-in between the picketing and the Arizona Master Labor Agreement—a very fragile one, too—is that one of the Laborers Union's agents attended the January meeting when Colson & Stevens discussed signing the agreement. (Tr 300) However, the Laborers Union stood ready to negotiate, and not necessarily for the Arizona Master Labor Agreement. (Tr 404)

After picketing for less than 30 days, the picket was removed (Tr 400, 401)

So much for the Laborers Union.

A further implication of the Board's findings is that each of these unions, in picketing, was telling Colson & Stevens to sign the Agreement on a take-it-or-leave-it basis, or else the company would be picketed until it did sign. The record simply will not support such a finding. Even if it can be inferred that each union picketed to force the company to *negotiate,* or to negotiate and sign *some kind of an agreement,* this does not necessarily mean that the Arizona Master Labor Agreement, intact with its subcontractor clause, was required by the picketing.

It is therefore respectfully submitted that the Decision should be reversed, since on this crucial finding of *fact,* there is no substantial evidence in support thereof.

II

Had Colson & Stevens signed the Arizona Master Labor Agreement, it would not, by its terms, have compelled that company to "cease doing business" with subcontractors Schwartz, Riggs and Haun. Therefore, the signing of the Agreement was not a proscribed object of the picketing within the meaning of subsection (B) of 8(b)(4).

The Board's conclusion that this Agreement would have compelled Colson & Stevens to "cease doing business" with Schwartz, Riggs, and Haun, is couched in the statutory language of subsec-

tion (B). This phrase is identical to that used in section 8(e) which deals expressly with these kinds of agreements. To *cease* is not the same as to *refrain* from doing business. The former refers to *existing* contractual relationships. The latter refers to *in futuro* relationships. *Hoffman v. Teamsters, Joint Council No. 38* (N. Dist. Calif.; 1962) —F. Supp.—, 45 L.C. ¶ 17.803 Also, see "A Critical Analysis" in *The Georgetown Law Journal,* Vol. 48, at p. 355. The line of cases permitting restrictions on subcontracting, hereinafter cited in detail in Argument III, is consistent with this distinction, although based on another ground.

This is an important distinction in this case because *there were no existing contractual relationships* between Colson & Stevens and the subcontractors named, *which would have been affected by the terms* of the Agreement.

First, it should be noted that when the Carpenters Union *began* picketing, only Schwartz had an *existing* contract. The rest of the subcontractors were union, and this would exclude Haun and Riggs. (Tr 53, 130, 200, 313) Haun's subcontract was dated Oct. 21, 1960. (Tr 130) When the Laborers Union began picketing in January, of the three only Riggs had an *existing* contract. (Tr 53) Thus, if Colson & Stevens had signed the Agreement with the Carpenters Union in October at or before the picketing began, it couldn't have caused the company to "cease doing business" with Haun or Riggs. Likewise, as to Schwartz and Haun when the Laborers Union began picketing.

Secondly, as to any subcontracts then in existence at the time either of the unions picketed, the signing of the Agreement would *not* have affected them either. Quite obviously, as a matter of simple contract law, *the extent of the rights and liabilities of the subcontractors was already fixed by such existing subcontracts,* and none of the subcontractors legally could have been compelled by Colson & Stevens to change them to accommodate the provisions of the Arizona Master Labor Agreement.[5]

[5] Many of the basic parts of the Agreement are reprinted in the Appendix. The subcontractor clause (Article I. c) binds the general contractor: "Provisions shall be made in such subcontract for the observances by said subcontractor of the terms of this agreement. . . ."

It may be that Colson & Stevens would have had to pay damages pursuant to grievance procedures in the event either of the existing subcontractors failed to pay wages, etc., at the level called for in the Arizona Master Labor Agreement. Of course, this is merely *speculative,* since for no other reason there was no showing in the record that these subcontractors were not maintaining a level of wages and conditions as high as that called for in the Agreement. As to Riggs on the school jobs, the presumption would be that he was so paying, since these jobs required, pursuant to state law, the payment of "prevailing wages." The prevailing wages on the jobs are determined by the terms of the various AFL-CIO labor agreements in the area. A.R.S. 34-322 and 325 (Tr. 203).

Thus, the signing of the agreement could have affected these subcontractors *in futuro* only, when Colson & Stevens, in accordance with the Agreement, would quite probably, but not necessarily, have required them to observe the standards established by the Agreement in any *subsequent* subcontracts entered into with them. But, this would not constitute a *ceasing* to do business within the meaning of the Act. Therefore, the signing of the Agreement was not a proscribed object of picketing.

This distinction between *existing* and *in futuro* relationships is especially put into issue in this case since the General Counsel contended, and the Trial Examiner and the Board have held, that the object of the picketing was to *obtain* the Agreement. General Counsel contended and the Board has held that the Agreement "by its very terms" (R 55) also made an object of the picketing the forcing of Colson & Stevens to cease doing business with these subcontractors. The Trial Examiner disagreed with such legal conclusions, and properly so. *At no time* has it been found that either union picketed *with an intent to continue doing so* until the *subcontractors* came to terms or were forced off the job. To the contrary, the Trial Examiner expressly found (R 28), and was not reversed by the Board, that:

> "Neither Local asked Colson immediately to terminate his subcontracts and neither made any demands on the subcontractors. All concerned expected changes in these relationships once the

Master agreement was signed. But it may not be assumed that the Locals or either of them would have sought to enforce the subcontracting clause of the Master agreement by unlawful means. *The signing was the objective and enforcement was left to the future....*" (emphasis added)

The point is emphasized that the Board predicated its conclusion that the picketing was illegal, as having a prohibited object thereof, *solely* on the *legal effect* of *the terms* of the Agreement. It follows, of course, that if the Board erred in this respect then its Decision must be reversed as to the subsection (B) violation.

One further reason why the *terms* of the Agreement would not have affected these named subcontractors, and this regardless of their status as existing or future contractors: None of them employed persons working in the *classifications covered* by the Arizona Master Labor Agreement. Schwartz and Riggs were plumbers. Haun was a brickmason. The inference is that these crafts have separate collective bargaining agreements. (Tr 382)

The Arizona Master Labor Agreement (Ex. 44) was negotiated originally by several contractor associations and the several *carpenter, laborer, cement mason,* and *teamster unions,* to cover the wages, hours, etc., of just those *particular classifications* of employees. *At no place in the Agreement are there provisions relating to plumbers and brick masons.* Thus, unless these named subcontractors were employing carpenters, laborers, cement masons, or teamsters — and there is no substantial evidence on this — there would have been absolutely no effect upon these subcontractors "by the very terms" of the Agreement.

For the reasons stated, it is respectfully submitted that the Board erred in concluding that the picketing had an illegal object of forcing Colson & Stevens to *cease doing business* with the three named subcontractors within the meaning of subsection (B) of 8 (b) (4).

III

Assuming arguendo that the signing of the Agreement was an object of the picketing and that the terms of the Agreement would have affected the various subcontractors, nonetheless the picketing

was primary in nature and therefore not unlawful under section (B) of 8 (b) (4) since the subcontractor clause was a mandatory subject of collective bargaining.

Colson & Stevens was engaged in the construction industry. At the time of the picketing it was employing carpenters and laborers but subcontracting all other work requiring the other crafts. (Tr. 177)

The general nature of the construction industry is such that a general contractor will be working one week at one place, with numerous employees in numerous classifications, but will be working the next week at an entirely different place, with an entirely different group of employees. Depending upon the job involved, the general contractor will use either a few or many employees, and either a few or many employee classifications. Depending on the job it will subcontract extensively, or not at all. Work is intermittent and contractors customarily find themselves between jobs with no employees at all on the payroll.

Workers following this industry are paid for the hours worked only and must, of necessity, shift from job to job, from contractor to contractor, in order to maintain a substantial frequency of employment.

In short, as to contractors in this business, there is no certainty from week to week what the collective bargaining unit of employees will be.

In these circumstances where the contractor can either subcontract a lot or a little, *at will,* it becomes necessary that the contractor be induced to agree to condition his subcontracting in such a manner as will protect the jobs and work standards of the unionized workers employed by him, and in a manner as will obviate the effect of any subcontracting done for the mere sake of dodging the collective bargaining agreement. On the other hand, because of the economics of the industry, the contractor is left free to subcontract when bona-fide business reasons dictate such a move. These would have been the effects of the Arizona Master Labor Agreement had Colson & Stevens signed it.

The subcontractor clause contained in said Agreement, which

according to the Board's theory tainted the picketing with illegality, reads as follows:

> "C. That if the Contractors, parties hereto shall subcontract construction work as defined hereafter in Article III of this Agreement, the terms of said Agreement shall extend to and bind such construction subcontract work, and provisions shall be made in such subcontract for the observance by said subcontractor of the terms of this Agreement. A subcontractor is defined as any person, firm or corporation who agrees under contract with the general contractor or his subcontractor to perform on the job site any part or portion of the construction work covered by the prime contract . . . "

This clause says to the signatory contractor that it is responsible to see to it that the wage and working standards set out in the Agreement shall be complied with, should it subcontract any work to be performed *by the employees covered by the Agreement.* This would have discouraged Colson & Stevens from, for example, subcontracting all carpentry work on its next job after the Yellow Front. At the same time, it would not have prohibited such subcontracting in the event some bona fide business reason indicated the desirability to do so.

The placing of restrictions upon subcontracting has long been recognized as a matter of legitimate concern on the part of organized labor. In *Ohio Valley Carpenters District Council,* etc., 136 N.L.R.B. No. 89 (1962), the Board stated the rule thusly:

> "... it has long been recognized that restrictions on subcontracting work out to another employer, or on(e) otherwise having done elsewhere work *usually performed by employees in a bargaining unit,* is a mandatory subject of collective bargaining and a proper matter for contract inclusion. See, Timkin Roller Bearing Co., 70 NLRB 500, 518; W. L. Rives Co., 125 NLRB 772, 782; Local 24, Teamsters v. Oliver, 358 U. S. 283, 294-5 (36 LC ¶ 65, 161). *Contractual restrictions of this character undoubtedly impinge upon an employer's freedom to engage in business with others."* (Emphasis supplied.)

Further examples of this kind of collective bargaining may be found in *Railroad Telegraphers* v. *Chicago & Northwestern Ry. Co.,* 362 U. S. 330, 45 LRRM 3,104. The Supreme Court held that an employer railroad was obligated to bargain concerning its

decision to abandon a number of stations and to discharge the station agents. In *Local 24, Teamsters* v. *Oliver* (1959) 358 U. S. 283, 43 LRRM 2,374, an agreement regulating the minimum rental and other terms of leases between the carrier employer and his "employees" who owned and operated their own trucks in the service of the employer, was held to be "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining agreement," and therefore was a proper subject of collective bargaining. The court noted that the federal labor laws were calculated to promote collective bargaining, "to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." It also said: "Within the area in which a collective bargaining was required, *Congress was not concerned with the substantive terms upon which the parties agreed.*" (Emphasis supplied.)

In *Deaton Truck Line* v. *Local 612, Teamsters* (CA-5; 11/1962),—F.2d—; 51 LRRM 2552, it was held that a union had a legitimate interest in protecting its area wage standards by making them applicable to lessor-drivers who were not employees as well as to employee-drivers. The case there involved section 301 of the Act which permits suits for breach of collective bargaining agreements to be brought in federal courts. In referring to the *Oliver* case, supra, the Circuit Court said:

> "The Supreme Court has heretofore taken the position that it is not necessary to determine whether owner-operators are 'employees' protected by the Act, since the establishment of minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. Teamsters Union v. Oliver, 1959, 358 U. S. 283, 294-295, 43 LRRM 2374; United States v. Drum, 1962, 368 U. S. 370, 382, n. 26. It is true that in Oliver, approved in Drum, the bargaining unit included an overwhelming majority of concededly employed drivers, while in the present case there are very few admitted employees, and an overwhelming majority of lessor-drivers. However, the Union points out, soundly we think, that it has a legitimate interest in protecting its area wage standards.

> See In re Local Union No. 741, etc. (Keith Riggs Plumbing, etc.), 1962, 137 NLRB No. 121, 50 LRRM 1313 at 1314 . . ."

In *Local Union No. 741, etc. (Keith Riggs Plumbing, etc.)* cited by *Deaton,* supra, the Plumbers Union had picketed Riggs on certain building projects in Tucson, Arizona, not for organizational or recognitional purposes, but simply to advertise and put pressure on Riggs to force him to cease and desist from paying wages and benefits below the area standards. The Board held this to be *protected* activity and not unlawful, even though as a result of the picketing, employees of other employers refused to cross the established picket line. The Board noted:

> ". . . Indeed the importance of maintaining area standards as a matter of public as well as union interest was long ago endorsed by Congress by its enactment of the Davis-Bacon Act (40 U.S. Code, Sec. 276a et seq.) . . ."

In *Town and Country Manufacturing Co.,* 136 N.L.R.B. No. 111, 49 LRRM 1918, the Board held that a company was required to collectively bargaining before subcontracting our work in the bargaining unit even though the company's motives might have been purely economic.

For further variation of the basic rule, see *Local 19, Longshoremen,* 137 NLRB No. 13.

In the instant case, the effect of the subcontractor clause on Colson & Stevens, had it signed the Agreement, would have been to protect to some degree the jobs and the working standards established under the Arizona Master Labor Agreement for its carpenters and laborers. For this reason, and pursuant to the authorities hereinabove stated, the subcontractor clause was a mandatory subject of collective bargaining. Thus picketing to obtain such a clause was *primary* conduct permissible under Sections 7 and 13[6] of the Act, and was *not* unlawful within the meaning of (B) of 8(b)(4). Accordingly, it is respectfully submitted that the Board's Decision and Order should be reversed to the extent that it finds a violation of subsection (B).

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[6] These sections permit picketing for collective bargaining purposes, among others, except where such conduct is specifically prohibited. 29 U.S.C. 157,163.

IV

Assuming, arguendo, that the picketing was to obtain the signing of the Arizona Master Labor Agreement, nonetheless such conduct was primary in nature and not in violation of either subsection (A) or (B) of 8(b)(4), since the Agreement was lawful, and expressly so declared by the construction industry proviso to section 8(e).

The prime basis for finding the 8(b)(4) violations in this case is the Board's *per se* proposition that "a strike or picketing to obtain such agreements (referring to the subcontractor clause in the Arizona Master Labor Agreement) would . . . be, without more, unlawful under section 8(b)(4)" prior to the 1959 amendments. (R.55) This, of course, was not the law prior to 1959, and even if it were, the amendments in 1959 made *lawful* such conduct insofar as the *construction* industry is concerned.

An analysis of the statutes involved will demonstrate that neither of the unions violated the prohibitions therein contained.

Subsection (A) of 8(b)(4) makes picketing unlawful where an object is:

"(A) forcing . . . any employer . . . to *enter* into any agreement which is prohibited by section 8(e);" (emphasis added)

Section 8(e), in material part, reads:

"(e) It shall be an unfair labor practice by any labor organization and any employer to *enter* into any contract . . . whereby such employer ceases . . . or agrees . . . to cease doing business with any other person, and any contract or agreement *entered* into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction. . . .*" (Emphasis added)

Subject to the construction and garment industries' exemptions, the purpose of these two statutes was to outlaw hot-cargo and boycott agreements generally, and to make it an unfair labor practice for a union to strike or picket to force an employer to enter into

an agreement of that sort. *NLRB v. Lithographers, Local 17* (CA-9; 1962) 309 F.2d 31; 45 LC ¶ 17,817.

But, the Trial Examiner found (R 28) that "Colson is engaged in the *construction* industry and the contract sought would have application *only to work done at the construction site.*" (Emphasis added) The Board confirmed this finding. (R 54) *Thus, the Arizona Master Labor Agreement falls precisely within the exception to 8(e).* In short, it was "not prohibited by section 8(e)" within the meaning of subsection (A).

By the simplest of logic, therefore, picketing to force Colson & Stevens to enter into the Agreement could not be said to be in violation of subsection (A) of 8(b)(4).

Notwithstanding the *plain and unambiguous* language used in these two statutes, the Board maintains that statutory harmony and the "general purposes of Congress and the previously applicable law" require the courts to blind themselves to the obvious and to find, somehow, that picketing to obtain this agreement, although *not* prohibited by section 8(e), was violative of subsection *(A)* of 8(b)(4).

But the Board points to *no ambiguity* in either subsection (A) or in the proviso to 8(e). Instead, it suggests that the implications of *Sand Door (Local 1976, United Brotherhood of Carpenters, etc. v. NLRB,* 357 U.S. 93, 98), and the legislative history of the Landrum-Griffin Act call for such a conclusion. This approach to statutory construction is improper. *Ex Parte Collett,* 337 U.S. 55; *Gemsco, Inc.* v. *Walling,* 324 U.S. 244; *Packard Motor Co.* v. *NLRB,* 330 U.S. 485; *Unexcelled Chemical Co. Corp.* v. *U.S.,* 345 U.S. 59; *Servette, Inc.* v. *NLRB* (CA-9; 1962) 310 F2d 659, 46 LC ¶ 17,944.

The Board made the same contentions in *LeBus, etc.* v. *Local 60, United Asso., etc.,* 193 F.Supp. 392 42 LC ¶ 16,930. The Court had this to say about the Board's position:

> "There is no merit in the NLRB's argument that the quoted proviso of subsection (e) merely sanctions *voluntarily entering into* a 'hot cargo' agreement in the construction industry but does not lift the ban on coercive measures designed to *force* such

a stipulation from an employer. Whatever the wisdom of the policy, the clear text of § 8(b)(4)(A) denies the union its traditional weapons only when it would use them to secure an *illegal* agreement, and neither § 8(e), which 'shall not apply' to such an agreement, nor any other provision, condemns the so-called 'subcontractor clause' in bargaining contracts. As the NLRB itself emphasizes, the Conference Report with regard to the proviso to § 8(e) dealing with such agreements says it was 'not intended * * * (to) change the existing law with respect to judicial enforcement of these contracts or *with respect to the legality of a strike to obtain such a contract,*' and, while either implication might be read in the language, the fact is that striking to obtain a subcontractor agreement was not illegal when the Taft-Hartley Act was amended in 1959. *Carpenters' Union v. Labor Board (Sand Door),* 357 U.S. 93 (35 LC ¶ 71,599), had merely held that such an agreement could not be 'enforced' through a prohibited secondary boycott, but it did not condemn other lawful activity directed to persuading the employer to enter into that type of stipulation. Nothing in the original Taft-Hartley law, or in its legislative history, indicates an intent to ban such activity and there is no ground for holding that conduct illegal. It follows that the charge under § 8(b)(4)(A) is without merit."

Likewise, in *Cuneo v. Carpenters, Essex County & Vicinity,* 207 F.Supp. 932, 45 LC ¶ 17,826, the court, in dealing with facts quite parallel to those in the instant case, said:

". . . I respectfully reject as a precedent here the Board's conclusion in *Colson & Stevens* that the agreement in question was 'prohibited by section 8(e)' of the Act for the simple reason that the agreement presently in question is *expressly* excepted from the prohibition of that section by the proviso thereof . . ."

It is respectfully submitted that the Board erred in concluding that either of the unions violated subsection (A) of 8(b)(4) in picketing to obtain an agreement *expressly exempt* from the prohibitions of section 8(e). Accordingly, the Board's Decision should be reversed in this respect.

But did the unions violate what is now subsection *(B)* of 8(b)(4) by picketing to *obtain* the Arizona Master Labor Agreement? It is respectfully submitted that they did not.

Prior to the 1959 amendments, subsection (A) of 8(b)(4) was the so-called secondary boycott statute. In material part, (and subject to much interpretation) it prohibited picketing where an immediate or direct object thereof was:

> "(A) forcing or requiring any employer . . . to cease doing business with any other person;"

This subsection was redesignated as subsection (B) as a result of the Landrum-Griffin amendments. Also, a proviso was added. In material part, (B) prohibits picketing where an immediate or direct object thereof is:

> "(B) forcing or requiring any person . . . to cease doing business with any other person . . . : Provided, that nothing contained in this clause (B) shall be construed to make unlawful where not otherwise unlawful, any primary strike or primary picketing;"

The formal explanation for the effect of this *proviso* was given in the House Report, H. R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959) I. Legis Hist LRMDA 942 as follows:

> ". . . The purpose of this provision is to make it clear that the changes in Section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. *This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law.*" (emphasis added)

Quite clearly, it becomes important in the instant case to ascertain how this subsection was *interpreted* prior to the 1959 amendments, since the Board predicates its Decision upon "the proposition that a strike or picketing to obtain such agreements (as the Arizona Master Labor Agreement) . . . (was), without more, unlawful under Section 8(b) (4) (A) prior to the 1959 amendments." (R 55)

What about the Board's proposition? One thing is certain—it is *novel.* This in itself hardly recommends it, since the instant case involves a fact situation that must have been repeated thousands of times since the Taft-Hartley was passed in 1947. The cases[7]

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[7] *Texas Industries, Inc.,* 234 F2d 296 (CA-5) *NLRB v. Bangor Bldg. Trades Council,* 278 F.2d 287 (CA-1); *Bricklayers, etc.,* 125 NLRB 1179.

cited by the Board in its Decision (R 55) are clearly distinguishable on their *facts* and in some instances on the particular statutes involved. Nor is accuracy of such a proposition "implicit" in the legal analysis of the *Sand Door* opinion. *(Local 1976, United Brotherhood of Carpenters v. Labor Board, supra.)*

As for *Sand Door,* it held that a union could not engage in picking of a *neutral* employer with a prohibited object under what is now (B), and then excuse such conduct by saying it was merely enforcing its hot cargo agreement with the neutral employer. But the court made it plain that a hot cargo agreement was *legal, that unions could properly negotiate for such agreements,* that the existence of such an agreement was *not prima facie* evidence of illegal inducement, and even went so far as to say:

> ". . . . It does not necessarily follow from the fact that the unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases that it may not, in some totally different context not now before the Court, still have legal radiations between the parties."

In *Le Bus, Regional Director, etc. v. Local 60, United Assn. of Journeymen, etc., supra,* the court held that

> ". . . . the fact is that striking to obtain a subcontractor agreement was not illegal when the Taft-Hartley Act was amended in 1959. *Carpenters' Union v. Labor Board (Sand Door)* 357 U.S. 93, had merely held that such an agreement could not be 'enforced' through a prohibited secondary boycott, but it did not condemn other lawful activity directed to persuading the employer to enter into that type of stipulation. Nothing in the original Taft-Hartley Act, or in its legislative history, indicates an intent to ban such activity . . . ."

In *Cueno v. Carpenters, etc.,* supra, the court said:

> "The *Sand Door* case, upon careful perusal, does not . . . disclose support for the contention that the presently pending strike constitutes an unfair labor practice under the Act, either before or since the 1959 amendment . . . . *Sand Door* did not hold that members of a labor organization, in negotiating a collective bargaining agreement with their employers, might not employ a strike as a means of forcing the employers to include in the agreements provision that members of a Union

would not be forced to work upon construction projects alongside of non-union employees of subcontractors thereon . . . ."

The Board's position in the instant case is somewhat akin to that which it recently stated to this court in *NLRB* v. *Lithographers, Local 17,* (CA-9; 1962), supra. There the Board urged that a "chain shop" clause "standing by itself" was unlawful because it would permit a kind of strike unlawful under 8(b)(4). This court noted, however, that the chain shop clause had nothing to do with *strikes or other coercive action* "standing by itself," and said:

"It follows that if the chain shop clause is unlawful it must be because some provision of the Act other than 8(b)(4)(A) and (B) make it so . . . ."

Likewise, the subcontractor clause in the instant case has nothing to do with strikes or other coercive action in and of itself. Likewise, it would involve a kind of strike unlawful under 8(b)(4) *if* either of the unions engage in that kind of conduct to *enforce* it. And, likewise, it must follow that *if the clause is unlawful, it must be because some provision of the Act other than 8(b)(4)(A) or (B) make it so.*

Further, this court in *Lithographers,* supra, by clarifying the Board's Order there enforced, declared that "insistence" upon the chain shop clause would not violate the Order as affirmed. Noteworthy is the fact that the court recognized that if coercion were used under certain circumstances to *enforce* the chain shop clause, this would be unlawful. The thrust of this ruling is that picketing to *obtain* a legally phrased clause is *not* subject to the ban of subsection (B) of 8(b)(4), even though the same conduct to *enforce* it might involve such a violation.

Not only have the few cases dealing specifically with this kind of situation ruled contrary to the Board's self-serving statements as to the "law" before 1959, but, also it seems that the Board is urging a position completely at odds with the long-settled rullings regarding what is *secondary* and what is *primary* picketing. In *NLRB v. International Rice Milling Co.,* supra, it was held that 8(b)(4) did not seek to interfere with the ordinary strike. And *that* is all that was involved in the instant case.

The Supreme Court in *Sand Door,* supra, noted that 8(b)(4) does not prohibit *all* secondary boycotts, saying:

". . . It aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of *neutral* employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes . . . ." (Emphasis added)

Also, see *Local 761, Inter. U of E., R & M. Wkrs, v. N.L.R.B.,* 366 U.S. 667.

This is still the *aim* of 8(b) (4) (B). Colson & Stevens was certainly not a *neutral,* and the picketing at *that company's premises* certainly was not a *widening* of a conflict which the unions had with somebody else. In fact it was acknowledged by General Counsel (Tr 352) that neither of the unions had a dispute with any of the named subcontractors. At least, he objected to testimony on this point as being *irrelevant.*

The *only* legislative history having any bearing on this matter is that found in the 1959 amendments. There, *Sand Door* was assumed to have held that picketing to *enforce* hot cargo agreements was illegal. Sen. Kennedy said:

"The first proviso under new section 8(e) of the National Labor Relations Act is to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agrements relating to the conracting of work to be done at the site of a construction project.

This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U.S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force.

Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. Since the proviso does not relate to section 8(b)(4), strikes and

picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.

It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.

It should be particularly noted that the proviso relates only to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite." H.R. Rep. No. 1147 on S. 1555, 105 Cong. Rec. 16415, II Legis. Hist. of LMRDA 1433.

Not only by these expressions which are consistent with *LeBus,* supra, *Cuneo,* supra, & *Lithographers,* supra, *but also by the statutes actually passed,* did Congress reveal *its understanding* of the law as it existed before the amendments. It *voided* by 8(e) all hot cargo agreements, leaving only certain construction site and garment industry agreements excepted, and it made it illegal under 8(b)(4)(A) to *force* an employer to *enter* into the *voided* agreements. It seems obvious that Congress believed that what is now subsection (*B*) of 8(b)(4) would *not* prohibit strikes and picketing to force employers to *enter* into the kinds of agreements declared to be void. *Therefore, to make it unlawful to picket to obtain these kind of agreements Congress adopted an express statute to that affect, namely subsection (A).* The Board's contention that picketing to obtain such an agreement, "without more," is unlawful under (B) "by reason of the law prior to the 1959 amendments," imputes to Congress not only a misunderstanding as to what the law then was, but also the doing of an absolutely needless thing, even a redundant and confusing thing, in cluttering the statutes with *(A).* Such a presumption cannot properly be indulged in, of course.

There has been no shortage of scholarly and contradictory comment in the various law journals concerning the meanings to be given to the scissors-and-paste job done to the law by the 1959 amendments. But the most penetrating and succinct observation

yet discovered by this writer regarding the Congressional intent toward the construction industry and the inter-play of subsections (A) and (B) was made by the Trial Examiner in this very case when he said: (R 28)

> ". . . It would be indeed an anomaly and a pointless hoax for Congress to permit otherwise lawful picketing for a "subcontractors clause" in the construction industry in Section 8(b)(4)(A) as coupled with Section 8(e) and then to forbid it under Section 8(b)(4)(B). I find it did not do so . . . ."

It is respectfully submitted that nothing in this case calls for the "expansive reading" given (A) & (B) by the Board in its Decision. Such an interpretive approach is not appropriate or allowable. *NLRB v. Teamsters, Local* 639, 362 U.S. 274, 39 LC ¶66,351.

The Board's finding that the unions' picketing violated (B) of 8(b)(4) should be reversed.

V.

Assuming, arguendo, a violation of either subsection (A) or (B), or both, by either or both of the unions, still the Order is too broad in scope, particularly as it relates to "any other employer."

The Board's Order (R 60, 61) is the same as to each union. It orders each of them to cease and desist from certain conduct relative to Colson & Stevens "or any other employer."

The evidence will not support a proclivity for unlawful action by either of the unions. Nor was there a finding relating to the likelihood of similar violations. Yet the Order places each of the unions in a dilemma in respect to employers against whom they have legitimate grievances if either Schwartz, Riggs, or Haun happens to be a subcontractor on the job, even though such grievance may be totally unconnected with the presence of these subcontractors. For these reasons, it is respectfully submitted that the Order should be modified by striking the words, "or any other employer" wherever they appear in the Order. *NLRB* v. *United Ass'n of Journeymen, et al.,* (CA-9; 1962) 300 F2d 649; 44 LC Para 17,512; *NLRB* v. *International Longshoremen's and Ware-*

housemen's Union, Local 10, et al., 283 F2d 558 (CA-9; 1960); and *Communications Workers of America, AFL-CIO, et al.* v. *NLRB*, 362 U.S. 479 (1960).

CONCLUSION

It is respectfully submitted that the Decision, insofar as it finds either of the unions guilty of violating Section 8(b) (4) (A) or (B), should be reversed and the case dismissed if the Court agrees with any *one* of the basic arguments made herein by the unions.

If the court agrees with none of the arguments, then it is respectfully submitted, in that alternative, that the scope of the Order should be modified to strike therefrom the words "or any other employer" wherever they appear.

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Unions
609 Luhrs Bldg.
Phoenix, Arizona

By.....
A. D. WARD

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....

April, 1963

APPENDIX A

Material parts of Exhibit 44, the Arizona Master Labor Agreement:

MASTER LABOR AGREEMENT

Labor Agreement between the Associated General Contractors, Arizona Chapter; Arizona Building Contractors, Building Chapter, Associated General Contractors; Phoenix Association of Home Builders; Arizona Consolidated Masonry and Plastering Contractors' Association; Community Home Builders' Association and Building and Construction Trades Unions.

THIS AGREEMENT entered into this 27th day of May, 1959, by and between the members of the ASSOCIATED GENERAL CONTRACTORS, ARIZONA CHAPTER; ARIZONA BUILDING CONTRACTORS, BUILDING CHAPTER, ASSOCIATED GENERAL CONTRACTORS; PHOENIX ASSOCIATION OF HOME BUILDERS; ARIZONA CONSOLIDATED MASONRY AND PLASTERING CONTRACTORS' ASSOCIATION AND COMMUNITY HOME BUILDERS' ASSOCIATION, who are signatories hereto and employers, non-members, who are signatory hereto, parties of the first part, hereinafter referred to as the Contractors.

and the

Laborers' District Council of the State of Arizona including Locals 479, 383 and 556;

Construction Locals in the State of Arizona of the United Brotherhood of Carpenters and Joiners of America including Locals 1089, 2402, 906, 1216, 1538, 1100, 1914 (Millwright), 471, 857, 2096, 1153, 445 and 326;

Locals No. 83 and 310 affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America;

Operative Plasterers' and Cement Masons' International Association, Local Unions No. 394 and 395;

who are signatory hereto, for themselves, for their various Craft Councils and Local Unions which have jurisdiction over the work in the territory hereinafter described, parties of the second part, hereinafter referred to as the Unions.

WITNESSETH:

PURPOSES:

WHEREAS, the CONTRACTORS are engaged in contract construction work in Arizona; and

WHEREAS, in the performance of its present and future contracting operations the CONTRACTORS are employing and will employ large numbers of workmen represented by various UNIONS, and

WHEREAS, the CONTRACTORS desire to be assured of their ability to procure employees for all of the work which they may do in the area hereinafter defined as Arizona in sufficient numbers and skill to assure continuity of work in the completion of their construction contracts; and

WHEREAS, it is the desire of the parties to establish uniform rates of pay, hours of employment and working conditions which shall be applicable to all workmen performing any work for the contractors, as such work is hereinafter defined in ARTICLE III of this Agreement.

NOW, THEREFORE, in consideration of the premises and of the respective covenants and agreements of the parties hereto, each of which shall be interdependent, IT IS HEREBY AGREED:

Article I

COVERAGE

A. That this Agreement shall apply to and cover all employees of the contractors employed to perform or performing construction work as such construction work is more particularly defined hereafter in Article III of this Agreement, in the area known as the State of Arizona, except those employees exempted from the provisions hereof by Article II of this Agreement; and the contractors

shall not offer or grant to any individual employee or group of employees whomsoever, performing any work mentioned in Article III of this Agreement, any less favorable terms and conditions of employment than provided for by this Agreement.

B. That all work performed by the CONTRACTORS, and all services rendered for the CONTRACTORS, as herein defined, by employees of the CONTRACTORS, shall be rendered in accordance with each and all of the terms and provisions hereof.

C. That if the Contractors, parties hereto shall subcontract construction work as defined hereafter in Article III of this Agreement, the terms of said Agreement shall extend to and bind such construction subcontract work, and provisions shall be made in such subcontract for the observance by said subcontractor of the terms of this Agreement. A subcontractor is defined as any person, firm or corporation who agrees under contract with the general contractor or his subcontractor to perform on the job site any part or portion of the construction work covered by the prime contract, including the operation of equipment, performance of labor and the furnishing and installation of materials. The prime contractor shall comply with the State Law regulating contracting which requires posting of notices.

D. That in no event shall the Contractors be required to pay higher rates of wages, or be subject to more unfavorable working rules than those established by the respective Unions for any other employer engaged in similar work in Arizona.

E. When the manufacturer's warranty covers the repairing or adjustment of equipment or machinery the terms of this contract shall not apply. However, in the cast of tire servicing, this exemption shall not apply when workmen are assigned for more than four hours continuously.

F. That the Contractors and their subcontractors shall have the choice in the purchase of materials, provided that they shall give preference to the use of materials, supplies or equipment which will not cause any discord or disturbance on the project between the parties hereto.

G. That all work performed in the Contractor's warehouses, shops or yards which have been particularly provided or set up to handle work in connection with a job or project covered by the terms of this Agreement, shall be subject to the terms and conditions of this Agreement. However, all work performed in other warehouses, shops or yards of the Contractors or subcontractors shall not be subject to the terms and conditions of this Agreement except the production or fabrication of materials used upon the project. This Agreement shall not prevent the employer from negotiating or making Agreements with the Unions for any work or classifications not covered by this Agreement provided that in the course of such negotiations, none of the work covered by this Agreement outside the permanent home yard, shop or warehouse shall be interfered with; and provided further that equipment and materials in permanent home yards, shops or warehouses at the time of the negotiations and/or dispute shall be allowed to be removed from the permanent home yards, shops or warehouses to construction projects being performed by that Contractor whose permanent home yard, shop or warehouse is involved in the dispute or negotiations.

Article III

WORK COVERED

A. The Construction of, in whole or in part, or the improvement or modification thereof, including any structures or operations which are incidental thereto, the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities used in connection with the performance of the aforementioned work and services and including, but not limited to, the following types or classes of work:

B. Street and Highway work, grading and paving, mechanical land leveling, excavation of earth and rock, grade separations, elevated highways, viaducts, bridges, abutments, retaining walls, subways, airport grading, surfacing and drainage, electric transmission line and conduit projects; water supply, water development, reclamation, irrigation, drainage and flood control projects, water

mains, pipe lines, sanitation and sewer projects, dams, tunnels, shafts, aqueducts, canals, reservoirs, intakes, channels, levees, dikes, revetments, quarrying of breakwater or riprap stone; foundations, pile drivings, piers, locks, dikes; river and harbors projects; breakwaters, jetties and dredging; warehouses, shops and yards, the construction, erection, alteration, repair, modification, demolition, addition or improvement, in whole or in part of any building structure, including oil and gas refineries and incidental structures, also including any grading, excavation, or similar operations which are incidental thereto, or the installation, operation, maintenance and repair of equipment, and other facilities used in connection with the performance of such building construction.

C. The parties agree to jointly take steps to assure that all Federally authorized construction projects, including electric transmission lines, conduit projects, and substations, shall specify that prevailing rates of pay be paid.

Article V

* * *

C. That in the event any grievance or dispute except a grievance or dispute concerning referral in the first instance (see Article II-D), is not satisfactorily settled by the employee or his representative and the superintendent in charge within twenty-four (24) hours from the time it is reported, it shall be referred to the business or special representative of the appropriate Union or Unions. Said business or special representative shall then attempt to adjust said grievance or dispute with the Contractor performing the work. If said grievance or dispute is not satisfactorily adjusted by said business or special representative and the Contractor within three (3) days from the date the grievance or dispute arose, it shall be referred to the Area Joint Labor-Management Committee, in the appropriate area, provided that a representative of the craft and a member of the construction firm involved in the controversy may represent his respective organization at the hearing. The said Area Joint Labor-Management Committee shall then hear and review any grievance or dispute submitted to it and adjudicate

the same. The decision of said Area Labor-Management Committee shall require an affirmative vote of not less than a majority of the Committeemen, and shall be final and binding upon all parties to this Agreement, except decisions appealed to the State Joint Conference Board from either party in which its decision shall be final and binding upon all parties to this Agreement. In the event the Area Joint Labor-Management Committee fails to render a decision within three (3) days after the grievance or dispute is submitted to it, the Secretary of the Area Joint Labor-Management Committee to which the grievance or dispute has been referred will submit the same to the State Joint Conference Board. In the event that the required majority of the Committeemen cannot be secured within three (3) days after the submission of the said grievance or dispute to said State Joint Conference Board, such Committeemen shall, upon request of any party to the grievance or dispute, select an additional person who shall act as arbiter and all of the parties hereto agree that the decisions that come from such arbitration shall be final and binding upon them. Any such request from an interested party for selection of an arbiter shall be made within ten (10) days after notification of the failure of the State Board Committeemen to reach a decision; and the State Board Committeemen shall then comply with such request within five (5) days of its receipt.

If, within twenty-four (24) hours after said Committeemen attempt to choose an additional person to act as arbiter, they are unable to agree upon such person, the arbiter shall be chosen in the following manner:

The Director of Federal Mediation and Conciliation Service of the United States shall immediately be requested by said Committee to submit the names of five persons qualified to act as arbiters. When said list has been presented the representatives of the Unions and the representatives of the Contractors shall each have the choice of rejecting the names of two of these five persons, the remaining or fifth one shall be selected as the arbiter within twenty-four (24) hours after submission of said list, and it shall be

mandatory for said arbiter to render a decision within forty-eight (48) hours thereafter unless an extension of time is mutually agreed to by parties hereto. All employee grievances and disputes between the parties regarding the interpretation or performance of any of the terms or conditions of this Agreement shall be submitted to the grievance procedure and arbitration in the manner provided in this section.

There shall be no lock-out by the employer nor cessation of work by the employees, unless there is a violation of this Agreement as determined under the provisions of this Article. This paragraph shall not apply where an employee covered by this Agreement is paid by a check which is returned or is otherwise invalid because of insufficient funds.

Article VI

WAGE SCALES AND WORKING RULES OF THE FOUR BASIC TRADES

The attached hourly wage rates and working rules are hereby referred to and made a part hereof. These wage rates and working rules shall apply to all work covered by the terms of this Agreement and performed by employees of the Contractors whose work classifications come within the jurisdiction of the following Unions:

Laborers' District Council of the State of Arizona..Appendix A

Section 1—General
Section 2—Mason Tenders
Section 3—Plasterer Tenders
Section 4—Tunnel & Shaft Workers
Sections 5—Watchmen

Construction Locals in the State of Arizona of the United Brotherhood of Carpenters and Joiners of America .....Appendix B

Locals No. 83 and 310 Affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.....Appendix C

Operative Plasterers' and Cement Masons' International Association, Locals No. 394 and No. 395 ..... Appendix D
Carpenters Joint Apprentice Program ..... Appendix E
Expense Allowance Map ..... Appendix F

APPENDIX B

Record of exhibits identified and/or received relating to this consolidated appeal:

General Counsel's Exhibits

No.	*Identified*	*Received*
29	p. 125	p. 126
30	125	126
44 (See Appendix A)	203	204

Respondent Unions' Exhibits

No.	*Identified*	*Received*
5	p. 216	p. 238
6	279	280
7	281	
8	411	413
9	411	415
10	411	415